Supreme Court, U.S.
FILED
MAY 18 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1591

In The
Supreme Court of the United States
October Term, 1986

THE CITY OF TWIN FALLS, IDAHO,
Petitioner,

vs.

ENVIROTECH CORPORATION, dba
ENVIROTECH SYSTEMS, INC.,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Ezra Hendon
Randall D. Morrison
Crosby, Heafey, Roach & May
Professional Corporation
1999 Harrison Street
Oakland, CA 94612
(415) 763-2000

Attorneys for Respondent
Envirotech Corporation

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED

1. SHOULD THIS COURT DENY CERTIORARI TO REVIEW A REASONABLE AND INFORMED DECISION BY THE COURT OF APPEALS ON A PURE QUESTION OF STATE LAW?

2. DID THE COURT OF APPEALS PROPERLY EXERCISE ITS DISCRETION IN DECLINING TO CERTIFY TO THE IDAHO SUPREME COURT AN ISSUE WHICH THE COURT OF APPEALS HAD SUFFICIENT STATE LAW AUTHORITY TO DECIDE?

PARTIES TO THE PROCEEDINGS

The only parties are petitioner, the City of Twin Falls, Idaho ("the City"), and respondent, Envirotech Corporation ("Envirotech"). Envirotech is a wholly-owned subsidiary of Baker Hughes Incorporated. Envirotech has the following subsidiaries which are not wholly owned:

1. Mitsui Zosen Eimco, Inc. (Japan)
2. Eimco Elecon, Ltd. (India)
3. Eimco, S.A. (Chile)
4. Eimco Sudamerica Inc. (Panama)

Envirotech presently has no affiliated companies.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
JURISDICTIONAL BASIS	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	3
I. THIS COURT SHOULD DENY CERTIORARI TO REVIEW A REASONABLE AND INFORMED DECISION BY THE COURT OF APPEALS ON AN ISSUE OF STATE LAW	4
II. THE COURT OF APPEALS PROPERLY EXERCISED ITS DISCRETION IN DECLINING TO CERTIFY THE COLLATERAL SOURCE ISSUE TO THE IDAHO SUPREME COURT	7
CONCLUSION	10

TABLE OF AUTHORITIES

Page

A. UNITED STATES SUPREME COURT DECISIONS

Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 86 L.Ed.2d 394, 105 S.Ct. 2794 (1985) 5

Chardon v. Fumero Soto, 462 U.S. 650, 77 L.Ed.2d 74, 103 S.Ct. 2611 (1983) 5

General Box Co. v. United States, 351 U.S. 159, 100 L.Ed. 1055, 76 S.Ct. 728 (1956) 5

Haring v. Prosise, 462 U.S. 306, 76 L.Ed.2d 595, 103 S.Ct. 2368 (1983) 5

Lehman Brothers v. Schein, 416 U.S. 386, 40 L.Ed.2d 215, 94 S.Ct. 1741 (1974) 7, 8

Palmer v. Hoffman, 318 U.S. 109, 87 L.Ed. 645, 63 S.Ct. 447 (1943) 5

Pierson v. Ray, 386 U.S. 547, 18 L.Ed.2d 288, 87 S.Ct. 513 (1967) 5

Propper v. Clark, 337 U.S. 472, 93 L.Ed. 1480, 69 S.Ct. 1333 (1949) 5

The Tungus v. Skovgaard, 358 U.S. 588, 3 L.Ed.2d 524, 79 S.Ct. 503 (1959) 5

United States v. Durham Lumber Co., 363 U.S. 522, 4 L.Ed.2d 1371, 80 S.Ct. 1282 (1960) 5

B. OTHER FEDERAL DECISIONS

Aetna Ins. Co. v. Craftwall of Idaho, Inc., 757 F.2d 1030 (9th Cir. 1985) 9

Bi-Rite Enterprises v. Bruce Miner Co., Inc., 757 F.2d 440 (1st Cir. 1985) 8

Cantwell v. University of Massachusetts, 551 F.2d 879 (1st Cir. 1977) 9, 10

TABLE OF AUTHORITIES—Continued

Page

Complaint of McLinn, 744 F.2d 677 (9th Cir. 1984) 9

Meckert v. Transamerica Ins. Co., 742 F.2d 505 (9th Cir. 1984) 9

Shakopee Mdewakanton Sioux v. City of Prior Lake, 771 F.2d 1153 (8th Cir. 1985) 8

State of Fla. Ex Rel. Shevin v. Exxon Corp., 526 F.2d 266 (5th Cir. 1976) 8

Toner For Toner v. Lederle Laboratories, 779 F.2d 1429 (9th Cir. 1986) 9

United States v. City of Twin Falls, Idaho, 806 F.2d 862 (9th Cir. 1986) 3, 6, 7

Venezia v. Miller Brewing Co., 626 F.2d 188 (1st Cir. 1980) 9

Waters v. Armstrong World Industries, Inc., 773 F.2d 248 (9th Cir. 1985) 9

C. STATE COURT DECISIONS

Alesko v. Union Pacific Railroad Co., 62 Idaho 235, 109 P.2d 874 (1941) 6

Anderson v. Gailey, 100 Idaho 769, 606 P.2d 90 (1980) 6

Diamond v. Oreamundo, 24 N.Y.S.2d 494, 248 N.E.2d 910 (1969) 8

King v. Beatrice Foods Co., 89 Idaho 52, 402 P.2d 966 (1965) 6

Lasselle v. Special Products Co., 106 Idaho 170, 677 P.2d 483 (1983) 6

D. STATUTES AND RULES

28 U.S.C. § 1254(1) 1

Supreme Court Rule 17 1

TABLE OF AUTHORITIES—Continued

Page

Supreme Court Rule 17.1(a) 4, 5

Supreme Court Rule 17.1(c) 4

E. TREATISES AND OTHER AUTHORITIES

Restatement (Second) of Torts § 920A (1977) 3

C. Wright, A. Miller, E. Cooper, *Federal Practice and Procedure* § 4248 (1978) 8

No. 86-1591

In The

Supreme Court of the United States

October Term, 1986

THE CITY OF TWIN FALLS, IDAHO,

Petitioner,

vs.

ENVIROTECH CORPORATION, dba ENVIROTECH SYSTEMS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JURISDICTIONAL BASIS

The City claims jurisdiction based on 28 U.S.C. § 1254 (1), but it has shown no grounds for granting certiorari under Supreme Court Rule 17.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves a State common law rule. No Constitutional or statutory provisions are at issue.

———o———

STATEMENT OF THE CASE

This case involves purely State law claims. The City sued Envirotech and others for breach of contract, breach of warranty and negligence in the design and construction of a sewage treatment plant. Envirotech constructed a sludge handling system for the plant. The City sued as a third party plaintiff in a federal court action brought by the United States against the City for violations of the treatment plant's EPA discharge permit.

The United States' suit was settled in 1980. The City's third party claims were tried in 1983-84, and the jury awarded a verdict against Envirotech. The City, however, appealed to the United States Court of Appeals for the Ninth Circuit. The City contended, among other things, that the District Court erred in ruling that a contract provision for refund of the purchase price constituted the City's exclusive remedy.

Envirotech cross-appealed on several grounds, including lack of federal jurisdiction over the City's third party claims. Envirotech also argued that the District Court erred in applying Idaho's "collateral source" rule to this contract action.[1] The collateral source rule is a principle

---

[1] The District Court had dismissed the City's negligence claim. The City, recognizing that the dismissal was proper, did not appeal this ruling. The only claims submitted to the jury were breach of contract and breach of warranty.

of tort law which precludes introduction of evidence that the injured party has received compensation from sources "collateral to" the tortfeasor. *See*, Restatement (Second) of Torts § 920A (1977).

The Court of Appeals reversed the District Court's ruling that the contract provided an exclusive remedy. The Court of Appeals also vacated the District Court's ruling on the collateral source issue. The Court of Appeals stated that the collateral source rule ". . . is a well-recognized principle in tort law . . . and Idaho follows this tort principle." *United States v. City of Twin Falls, Idaho*, 806 F.2d 862, 873 (9th Cir. 1986). The Court of Appeals concluded that the Idaho Supreme Court would not apply the collateral source rule in this contract action. *Id.* at 874.

After the Court of Appeals' decision, the City petitioned for a rehearing and, for the first time, moved for certification of the collateral source issue to the Idaho Supreme Court. The Court of Appeals denied the City's petition and motion. The City's petition to this Court followed.

———o———

REASONS FOR DENYING THE WRIT

This Court should deny a writ because the City has shown no grounds for granting one. This case is a dispute between two litigants in federal court under Idaho law. The case involves purely State law claims for breach of contract and breach of warranty. Whether or not Idaho's collateral source rule applies to these claims is not a federal question, much less a question into which this Court need inquire.

Recognizing that this case raises no substantive federal question, the City tries to concoct a procedural ques-

tion—whether the Court of Appeals should have certified the collateral source issue to the Idaho Supreme Court. The Court of Appeals, however, had ample State law authority to decide this issue, and it discussed that authority in its Opinion. In deciding not to certify the collateral source issue, the Court of Appeals acted well within the discretion accorded it by decisions of this Court.

I. THIS COURT SHOULD DENY CERTIORARI TO REVIEW A REASONABLE AND INFORMED DECISION BY THE COURT OF APPEALS ON AN ISSUE OF STATE LAW.

The City contends that the issue before this Court is "a mixture of state and federal substantive law issues, as well as federal procedural questions." Petition, pp. 6-7. The City also contends that, " . . . the Court of Appeals overstepped the constitutional and statutory bounds which distinguish the functions of federal and state courts . . . ." *Id.*, at p. 7.

Beneath this rhetoric, however, lie mundane issues. The City thinks the Court of Appeals' ruling on the collateral source issue is wrong. And, in hopes of a more favorable ruling, the City would like the issue certified to the Idaho Supreme Court.

These complaints do not warrant review by writ of certiorari. The City does not claim there is any conflict between the Court of Appeals' ruling and decisions of this Court, other Courts of Appeals, or the Idaho Supreme Court. *See,* Supreme Court Rule 17.1(a). The City does not identify any "important question of federal law" which should be settled by this Court. Rule 17.1(c). And, the City points to no judicial misconduct warranting super-

vision by this Court. Rule 17.1(a). The City's assertion that the Court of Appeals "overstepped . . . constitutional and statutory bounds" is simply another way of saying that the City disagrees with the Court's collateral source ruling and with its discretionary refusal to certify that issue to the Idaho Supreme Court.

This Court has made clear many times that it will not grant certiorari to review reasonable rulings by Courts of Appeals on issues of State law. *See, e.g., Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500, 86 L.Ed.2d 394, 105 S.Ct. 2794 (1985); *Chardon v. Fumero Soto*, 462 U.S. 650, 654-655, n. 5, 77 L.Ed.2d 74, 103 S.Ct. 2611 (1983); *Haring v. Prosise*, 462 U.S. 306, 314, n. 8, 76 L.Ed.2d 595, 103 S.Ct. 2368 (1983); *Pierson v. Ray*, 386 U.S. 547, 558, n. 12, 18 L.Ed.2d 288, 87 S.Ct. 513 (1967); *General Box Co. v. United States*, 351 U.S. 159, 165, 100 L.Ed. 1055, 76 S.Ct. 728 (1956).

In *Brockett* this Court observed:

> The Court has stated that it will defer to lower courts on state law issues unless there is 'plain' error, *Palmer v. Hoffman*, 318 U.S. 109, 118, 87 L.Ed. 645, 63 S.Ct. 447, 144 A.L.R. 719 (1943); the view of the lower court is 'clearly wrong,' *The Tungus v. Skovgaard*, 358 U.S. 588, 596, 3 L.Ed.2d 524, 79 S.Ct. 503, 71 A.L.R.2d 1280 (1959); or the construction is 'clearly erroneous,' *United States v. Durham Lumber Co.*, 363 U.S. 522, 527, 4 L.Ed.2d 1371, 80 S.Ct. 1282 (1960), or 'unreasonable,' *Propper v. Clark*, 337 U.S. 472, 486-487, 93 L.Ed. 1480, 69 S.Ct. 1333 (1949).

Brockett, supra, 472 U.S. 491, at 500, n. 9, 86 L.Ed.2d 394, at 403, 105 S.Ct. 2794.

In the present case, the Court of Appeals' interpretation of Idaho law was reasonable and correct. The

Court reviewed decisions of the Idaho Supreme Court which identified the collateral source rule as a doctrine of *tort law*. *Lasselle v. Special Products Co.*, 106 Idaho 170, 174, 677 P.2d 483, 487 (1983); *Alesko v. Union Pacific Railroad Co.*, 62 Idaho 235, 243, 109 P.2d 874, 878 (1941).[2]

The Court of Appeals also analyzed "the policy rationales underlying the collateral source rule" and concluded that extension of the rule to contract actions would be inconsistent with the measure of damages for breach of contract in Idaho. *United States, supra,* 806 F.2d 862, 873-874; *Anderson v. Gailey,* 100 Idaho 796, 800, 606 P.2d 90, 94 (1980); *King v. Beatrice Foods Co.*, 89 Idaho 52, 58-59, 402 P.2d 966, 969 (1965).

Finally, the Court of Appeals referred to the Restatements (Second) of Torts and Contracts, to leading commentators, and to decisions in other jurisdictions which indicated that the collateral source rule should not be extended to contract actions. *United States, supra,* 806 F.2d 862, at 873.

---

[2] In this Court, as in the Court of Appeals, the City erroneously suggests that *Lasselle* supports extension of the collateral source rule to breach of warranty cases. *Lasselle* was a personal injury action in which the plaintiff alleged negligence, strict liability, and breach of warranty. Only the negligence and strict liability claims were decided by the jury, and on appeal there was no discussion of warranty. With regard to the collateral source rule, the Idaho Supreme Court stated: "This Court has long recognized the rule that *'a tortfeasor* is not relieved from liability because of the contribution of others.'" *Lasselle, supra,* 106 Idaho 170, at 174, 677 P.2d 483, at 487; emphasis added.

In its Petition the City also fails to mention that *Alesko* was a tort case. In *Alesko* the Idaho Supreme Court applied the collateral source rule to government benefits received by a landowner for flood damage *caused by the defendant's negligence*. *Id.*, 62 Idaho 235, at 237, 109 P.2d 874, at 875.

It was "with these principles in mind" that the Court of Appeals concluded that the collateral source rule is a tort doctrine which the Idaho Supreme Court would not extend to contract cases. *United States, supra,* 806 F.2d 862, at 873-874. The Court of Appeals had ample support for this conclusion, and there is no reason for this Court to review it.

II. THE COURT OF APPEALS PROPERLY EXERCISED ITS DISCRETION IN DECLINING TO CERTIFY THE COLLATERAL SOURCE ISSUE TO THE IDAHO SUPREME COURT.

As we have seen, the Court of Appeals had sufficient state law authority to decide the collateral source issue. The Court discussed that authority at length in its Opinion. *United States, supra,* 306 F.2d 862, at 872-874. There was no need for the Court of Appeals to certify this issue to the Idaho Supreme Court.

This Court has made clear that certification, while often helpful, is a matter within the sound discretion of the lower Courts. In *Lehman Brothers v. Schein,* 416 U.S. 386, 40 L.Ed.2d 215, 94 S.Ct. 1741 (1974), the Court stated:

> We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory.

Id., 416 U.S. 386, at 390-391, 40 L.Ed.2d 215, at 220, 94 S.Ct. 1781.

Justice Rehnquist, in his concurring opinion, also stated:

> If a district court or court of appeals believes that it can resolve an issue of state law with available research materials already at hand, and makes the effort to do so, its determination should not be disturbed

simply because the certification procedure existed but was not used.

Id., 416 U.S. 386, at 395, 40 L.Ed.2d 215, at 222, 94 S.Ct. 1781.[3]

Lower federal courts have frequently expressed the same view. *See, Shakopee Mdewakanton Sioux v. City of Prior Lake*, 771 F.2d 1153, 1157, n. 2 (8th Cir. 1985), *cert. denied*, — U.S. —, 89 L.Ed.2d 301, 106 S.Ct. 1188 (1986), ("Absent a 'close' question and lack of state sources enabling a nonconjectural determination, a federal court should not avoid its responsibility to determine all issues before it"); *Bi-Rite Enterprises v. Bruce Miner Co., Inc.*, 757 F.2d 440, 443, n. 3 (1st Cir. 1985), (" . . . [I]t is inappropriate for a federal court to use such a [certification] procedure when the course state courts would take is reasonably clear"); *State of Fla. Ex Rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 274-275 (5th Cir. 1976), *cert. denied*, 429 U.S. 829, 50 L.Ed.2d 92, 97 S.Ct. 88 (1976); *see also*, *C. Wright, A. Miller, E. Cooper*, Federal Practice and Procedure § 4248 (1978).

---

[3] In *Lehman Brothers*, this Court vacated a judgment by a divided Court of Appeals and remanded, so that the Court of Appeals could reconsider whether an issue of Florida law should be certified to the Florida Supreme Court. *Id.*, 416 U.S. 386, at 391-392, 40 L.Ed.2d 215, at 221, 94 S.Ct. 1741. *Lehman Brothers* is markedly different from the present case. There, federal courts applied New York choice of law rules and determined that Florida law applied to an insider trading suit in the Southern District of New York. The issue was whether Florida courts would, in turn, adopt a New York decision, *Diamond v. Oreamundo*, 24 N.Y.S.2d 494, 248 N.E.2d 910 (1969), which extended insider trading liability.

No such intricacies are involved in the present case. Here, a unanimous Court of Appeals decided a question of tort law in a State within its own Circuit. There were no choice of law problems, and no danger that the federal court would be tempted to graft forum law onto that of a remote State.

In the present case, the Court of Appeals had sufficient State law sources to decide this question of Idaho law. The Court of Appeals has not hesitated to use the certification procedure in other Idaho cases when it did not have these sources. *See, Toner For Toner v. Lederle Laboratories,* 779 F.2d 1429, 1432 (9th Cir. 1986); *Waters v. Armstrong World Industries, Inc.,* 773 F.2d 248, 250 (9th Cir. 1985); *Aetna Ins. Co. v. Craftwall of Idaho, Inc.,* 757 F.2d 1030, 1034 (9th Cir. 1985); *Meckert v. Transamerica Ins. Co.,* 742 F.2d 505, 506 (9th Cir. 1984).

Certainly the City had no doubts about the sufficiency of State law sources until the Court of Appeals ruled against it. In months of briefing before that, the City argued that Idaho law supported its position on the collateral source issue. And, in years of litigation before that, the City was content to let federal courts decide all issues of State law. In seeking certification now, the City in reality seeks "a second chance at victory." *See, Complaint of McLinn,* 744 F.2d 677, 681 (9th Cir. 1984); *see also, Venezia v. Miller Brewing Co.,* 626 F.2d 188, 192, n. 5 (1st Cir. 1980); *Cantwell v. University of Massachusetts,* 551 F.2d 879, 880 (1st Cir. 1977).[4] Providing "two bites at the cherry," however, is not the purpose of certifi-

---

[4] In *Cantwell,* the Court also noted that, " . . . [O]ne who chooses the federal courts in diversity actions is in a peculiarly poor position to seek certification." *Id.,* at 880. The same is true here. The City chose a federal forum for its breach of contract and warranty claims, and those claims are no different from a typical diversity case. The City alleges ancillary and pendent jurisdiction based on the original federal suit by the United States. That suit, however, was settled in 1980. Since then, the City has insisted that federal courts decide its claims, and particularly, when Envirotech challenged federal jurisdiction. Now, however, the City claims that only a State court can resolve this issue.

cation (*Cantwell, supra,*), nor is it the purpose of certiorari.

———o———

CONCLUSION

The Court of Appeals decided that Idaho's collateral source rule is a tort doctrine and that the Idaho Supreme Court would not extend it to contract cases. This decision was amply supported by Idaho law and presents no federal question for review by this Court. The Court of Appeals' decision not to certify this issue to the Idaho Supreme Court was a proper exercise of the Court's discretion. The City's Petition for Writ of Certiorari should therefore be denied.

DATED: May 14, 1987.

Respectfully submitted,

CROSBY, HEAFEY, ROACH & MAY
Professional Corporation

By
EZRA HENDON
Attorneys for Respondent
Envirotech Corporation